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Mohammed Ariff bin Abdul Khalid & Ors v Director General of Immigration Department, Malaysia & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)(NCVC)-440–11 OF 2016
TENGKU MAIMUN, KAMARDIN HASHIM AND MARY LIM JJCA
30 MAY 2017

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Civil Procedure — Striking out — Appeal against order allowing striking out — Appellants vide writ summons and statement of claim sued respondents for declaration that their dismissal by respondents null and void — Respondents applied to strike out appellants' claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 — Whether this was plain and obvious case for striking out — Whether claim abuse of process of court — Whether claim scandalous, frivolous or vexatious

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Labour Law — Employment — Dismissal — Appellants vide writ summons and statement of claim sued respondents for declaration that their dismissal by respondents null and void — Respondents applied to strike out appellants' claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 — Whether on facts and circumstances of case, appellants could not, but proceed by way of judicial review under O 53 of the Rules of Court 2012 — Rules of Court 2012 O 18 r 19(1)(b), (d) & O 53

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The appellants, by way of writ of summons and statement of claim sued the respondents in the High Court for a declaration that their dismissal by the respondents was null and void. The respondents then filed an application to strike out the appellants' claim under O 18 r 19(1)(b) or (d) of the Rules of Court 2012 ('the ROC') on the grounds that the appellants' claim was scandalous, frivolous, vexatious and an abuse of the process of the court. The respondents submitted that the appellants were seeking to challenge the decision of a public authority, thus, such challenge must be commenced by way of judicial review. In resisting the striking out application, the appellants submitted that this was not a plain and obvious case for striking out. At the end of the trial, the learned High Court judge found that the appellants' action by way of a writ action instead of a judicial review proceeding was plainly an abuse of the process of the court. The learned judge therefore allowed the respondents' application to strike out the appellants' claim, hence the present appeal.

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Held, allowing the appeal and remitting the case to High Court for trial:

(1) In the present appeal, the appellants' claim was struck out by the High Court not because the appellants' claim disclosed no reasonable cause of action and was obviously unsustainable but because the High Court found that the appellants were using the wrong mode in the commencement of the proceedings against the respondents. The learned judge erred in failing to ascertain whether on the facts and circumstances of the instant case, the appellants could not, but proceed by way of judicial review under O 53 of the ROC (see paras 17 & 19).

(2) There was no statement of defence before the court to traverse the appellants' allegations in the statement of claim as the respondents had applied to strike out the appellants' claim upon service of the writ of summons and the statement of claim. On the face of it, the appellants' claim could not be said to be obviously unsustainable. The allegations raised in paras 9, 10, 11, 12 and 13 of the statement of claim were factual matters which merit investigation in a full trial (see paras 21–22).

(3) Applying the decision of the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 that a challenge on the use of appropriate procedure is very much fact based, the court unanimously held that on the facts and circumstances of the present appeal, the mode used by the appellants via the writ action was entirely appropriate. It could not therefore amount to an abuse of the process of the court which rendered the appellants' claim liable to be struck out nor could it be said that claim was scandalous, frivolous or vexatious (see para 24).

[Bahasa Malaysia summary

Perayu-perayu melalui writ saman dan pernyataan tuntutan menyaman responden-responden di Mahkamah Tinggi untuk mendapatkan satu deklarasi bahawa pembuangan kerja perayu-perayu oleh responden-responden sebagai batal dan tidak sah. Responden-responden kemudiannya memfailkan permohonan untuk membatalkan tuntutan perayu-perayu di bawah A 18 k 19(1)(b) atau (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa tuntutan perayu-perayu melampau, remeh, menyusahkan dan satu penyalahgunaan proses mahkamah. Responden-responden berhujah bahawa perayu-perayu memohon untuk mencabar keputusan pihak berkuasa awam, oleh itu, tindakan tersebut mesti dimulakan melalui semakan kehakiman. Dalam mencabar permohonan pembatalan, perayu-perayu berhujah bahawa tindakan ini bukan kes biasa dan jelas untuk pembatalan. Di akhir perbicaraan, hakim bicara yang terpelajar mendapati bahawa tindakan perayu-perayu melalui writ dan bukan melalui semakan kehakiman merupakan penyalahgunaan proses mahkamah. Hakim terpelajar seterusnya membenarkan permohonan responden-responden untuk membatalkan tuntutan perayu-perayu, oleh itu, rayuan semasa difailkan oleh perayu-perayu.

Diputuskan, membenarkan rayuan dan meremitkan semula kes ke Mahkamah Tinggi untuk perbicaraan:

(1) Dalam rayuan semasa, tuntutan perayu-perayu telah dibatalkan oleh Mahkamah Tinggi bukan kerana tuntutan perayu-perayu menzahirkan tiada kausa tindakan yang munasabah dan jelas tidak mapan tetapi kerana Mahkamah Tinggi mendapati bahawa perayu-perayu telah menggunakan mod yang salah untuk memulakan prosiding terhadap responden-responden. Hakim yang terpelajar juga terkhilaf apabila gagal memastikan sama ada berdasarkan fakta dan keadaan kes semasa, perayu-perayu tidak dapat, tetapi untuk meneruskan tindakan melalui semakan kehakiman di bawah A 53 KKM (lihat perenggan 17 & 19).

(2) Tidak terdapat pernyataan pembelaan di hadapan mahkamah untuk melintasi dakwaan-dakwaan perayu-perayu dalam pernyataan tuntutan kerana responden-responden telah memohon untuk membatalkan tuntutan perayu-perayu semasa penyerahan writ saman dan pernyataan tuntutan. Pada zahirnya, tuntutan perayu-perayu tidak boleh dikatakan sebagai jelas tidak mapan. Dakwaan-dakwaan yang dibangkitkan dalam perenggan 9, 10, 11, 12 dan 13 pernyataan tuntutan merupakan permasalahan fakta yang memerlukan penyiasatan dalam perbicaraan penuh (lihat perenggan 21–22).

(3) Menguna pakai keputusan Mahkamah Persekutuan dalam *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 bahawa cabaran terhadap penggunaan prosedur yang sepatutnya adalah sangat bergantung kepada fakta, mahkamah sebulat suara memutuskan bahawa berdasarkan fakta dan keadaan rayuan semasa, mod yang digunakan oleh perayu-perayu melalui tindakan writ adalah sesuai. Oleh itu, ianya tidak membawa kepada penyalahgunaan proses mahkamah yang mengakibatkan tuntutan perayu-perayu dibatalkan dan tindakan perayu-perayu juga tidak boleh dikatakan sebagai melampau, remeh atau menyusahkan (lihat perenggan 24).]

Notes

For a case on appeal against order allowing striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9278.

For cases on dismissal, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1178–1258.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (folld)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)
Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2011] 5 MLJ 465, FC (refd)

Legislation referred to

Public Officers (Conduct and Discipline) Regulations 1993
Public Services Disciplinary Board Regulations 1993
Rules of Court 2012 O 18 r 19, O 18 r 19(1), (1)(b), (1)(d), O 53
Rules of the High Court 1980 O 18 r 19(1), (1)(b), (1)(d)

Appeal from: Civil Suit No WA-21NCVC-45–05 of 2016 (High Court, Kuala Lumpur)

Syed Muhammad Adeeb Barakbah (Vignesh Kumar & Assoc) for the appellants.
Muzila bt Mohamed Arsad (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] This was an appeal by the appellants ('the plaintiffs') against the order of the High Court in striking out the plaintiffs' claim under O 18 r 19 of the Rules of Court 2012 ('the ROC'). We heard the appeal and had allowed the same. We now give our reasons.

BACKGROUND FACTS

[2] The plaintiffs were formerly immigration officers. They were dismissed from service after disciplinary proceedings were taken against them.

[3] By a writ of summons and statement of claim, the plaintiffs sued the respondents ('the defendants') in the High Court at Kuala Lumpur for a declaration that their dismissal was null and void and for damages.

[4] The defendants filed an application to strike out the plaintiffs' claim under O 18 r 19(1)(b) or (d) of the ROC on the grounds that the plaintiffs' claim was scandalous, frivolous and vexatious and an abuse of the process of the court.

[5] The application was premised on only one ground, namely that the plaintiffs had employed a wrong mode of proceeding. The defendants contended that the plaintiffs ought to have initiated an action against the defendants by way of judicial review under O 53 of the ROC instead of by way of writ action.

PROCEEDINGS IN THE HIGH COURT

[6] Before the learned High Court judge, learned senior federal counsel ('SFC') submitted that principally, the plaintiffs were challenging the decision of the first and the second defendants in dismissing them from public service, ie the Immigration Department of Malaysia. And because the plaintiffs were seeking to challenge the decision of a public authority, such challenge must be commenced by way of judicial review.

[7] Learned SFC relied on the decision of the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Mohd Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145. In *Ahmad Jeffri*, the appellant, a government officer attached to the Ministry of Cultural, Arts and Tourism was dismissed from service. He filed a writ of summons and statement of claim against the respondents seeking, inter alia, a declaration that his dismissal was void and of no effect and for damages for wrongful dismissal.

[8] The respondents in *Ahmad Jefri*, filed an application under O 18 r 19(1)(b) or (d) of the Rules of the High Court 1980 ('the RHC') to strike out the appellant's writ and statement of claim on the ground that it was an abuse of process of the court to commence a writ action rather than an application for judicial review under O 53 of the RHC. The High Court allowed the respondents' application to strike out the appellant's claim. The appellant's appeal to this court was dismissed. His appeal to the Federal Court was also dismissed.

[9] Coming back to the instant case, in resisting the striking out application, the plaintiffs argued that this was not a plain and obvious case for striking out. Learned counsel for the plaintiffs relied on the following cases which were commenced by a writ of summons and which were ventilated right up to the apex court:

(a) *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417;

(b) *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor* [2011] 5 MLJ 465; and

(c) *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149.

[10] In the above cases, there was no issue at all that the plaintiffs had brought the action via a wrong mode. A

[11] The learned High Court judge found favour with the submission for the defendants. Her Ladyship distinguished the cases cited by learned counsel for the plaintiffs as follows: B

> 11. With respect, I find that the cases relied on by the Plaintiffs can be distinguished: In *Tay Chai Huat*, the issue before the court was whether the decision of the disciplinary authority was subject to review wherein the respondent had alleged he had not been given a reasonable opportunity to be heard. A similar issue was raised in Yusof Sudin's case. The mode of commencement of action was not in issue. C
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> 12. Ahmad Jefri's case, however is directly on point. James Foong FCJ in fact made it very clear in his opening remark that —
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> > *[1] This appeal concerned the use (sic) the appropriate procedure for use in judicial review.* D

[12] In the circumstances, the learned High Court judge found that the plaintiffs' challenge of their dismissal by way of a writ action instead of a judicial review proceeding was plainly an abuse of the process of the court. The defendants' application to strike out the plaintiffs' claim was accordingly allowed, hence the appeal. E

THE APPEAL

[13] Learned counsel for the plaintiffs repeated his arguments in the court below and highlighted the cases of *Utra Badi*, *Yusof Sudin* and the most recent apex court case of *Tay Chai Huat*. These cases which had similar set of facts with the instant appeal had been filed through a writ action. None of these cases had any issue concerning the mode of commencement. F G

[14] Learned counsel submitted that as the above cases are the most recent regarding the current appeal, the doctrine of binding precedent comes into force and the effect of the judgment or ratio within the cases must be applied here that is since there is no issue of mode of commencement through a writ, it would not be an issue here as well. Learned counsel cited the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 where the Federal Court states: H

> When two decisions of the Federal Court conflict on a point of law, the later decision prevails over the earlier decision. I

[15] For the defendants, learned SFC submitted that the Federal Court in the case of *Ahmad Jefri*, had conclusively affirmed the proposition that in any challenge against the decision of a disciplinary authority of a public service, the

proper mode of proceeding to be instituted by the aggrieved person shall be by way of judicial review under O 53 of the RHC 1980. The plaintiffs' writ of summons cannot be maintained at law as it would tantamount to an abuse of the process of the court. The High Court judge was thus correct when Her Ladyship struck out the plaintiffs' writ of summons and statement of claim.

OUR DECISION

[16] As the present appeal concerned the striking out of the plaintiffs' claim, we would start off by reminding ourselves of the principles enunciated in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 which had been applied and reiterated in a string of other cases:

(a) that it is only in plain and obviously unsustainable cases that recourse should be had to the summary process under O 18 r 19(1) of the RHC/ROC;

(b) that this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;

(c) that it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;

(d) that a striking out order should not be made if there is an issue of fact that is capable of resolution only after taking viva voce evidence; and

(e) that the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defence raised are not arguable,

(see for example *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565).

[17] In the present appeal, the plaintiffs' claim was struck out by the High Court not because the plaintiffs' claim discloses no reasonable cause of action and was obviously unsustainable as such, but because, following the judgment of *Ahmad Jefri*, the High Court found that the plaintiffs were using the wrong mode in the commencement of the proceedings against the defendants.

[18] Whilst we were mindful of the judgment of James Foong FCJ in *Ahmad Jefri* which forms the basis of the defendants' application to strike out, we observed that except for *Utra Badi*, *Yusof Sudin* and *Tay Chai Huat* were decided by the Federal Court post *Ahmad Jefri*. In this regard, it is perhaps useful to reproduce the judgment of the Federal Court in *Ahmad Jefri* where at

p 172, it is stated thus:

> [62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr Zambry*. Much depends on the fact of the case.

[19] Guided by the above observation of the Federal Court, we found that the learned High Court judge erred in failing to ascertain whether on the facts and circumstances of the instant case, the plaintiffs could not, but proceed by way of judicial review under O 53 of the ROC.

[20] In the instant appeal, the plaintiffs sought to challenge the decision of the first defendant whose decision was made pursuant to the Public Officers (Conduct and Discipline) Regulations 1993. In determining the plaintiffs' appeal and in confirming the decision of the first defendant, the second defendant derived its powers from the Public Services Disciplinary Board Regulations 1993. Undoubtedly the defendants are public authorities and they were acting under specific laws. Nevertheless, it is pertinent to note that the plaintiffs' complaint was also founded on the following pleaded facts:

> 4. Pada setiap masa material, plaintif-plaintif telah bekerja sebagai pegawai-pegawai imigresen di bahagian visa, pas dan permit di ibu pejabat, Jabatan Imigresen Malaysia. Salah satu tugas plaintif-plaintif ialah untuk mengeluarkan Pas Residen-Talent kepada penama-penama yang telah diluluskan oleh pegawai atasannya. Pada setiap masa material, Pegawai Pelulus yang merupakan pegawai atasan plaintif-plaintif adalah Md Shperi bin Said.
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> 5. Pada 30 Ogos 2012, plaintif-plaintif telah diberikan surat pertuduhan dari Jabatan Imigresen Malaysia di mana satu tindakan tatatertib dilaksanakan terhadap plaintif-plaintif. Pertuduhan tersebut secara umum menyatakan bahawa plaintif-plaintif telah didapati menerima dan mencetak pengeluaran pas Residen-Talent ('Pas-Pas tersebut') yang disyaki dikeluarkan secara tidak teratur ke atas seramai 87 individu.
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> 9. Sepanjang penyiasatan pertuduhan tersebut, rakaman percakapan terhadap plaintif-plaintif juga telah dilakukan sebanyak dua kali di mana plaintif-plaintif

telah diprejudiskan berkenaan rakaman keterangan tersebut atas sebab terdapat wujudnya paksaan, dorongan dan janji semasa mengambil keterangan tersebut. Ia merupakan satu perlanggaran hak asasi plaintif-plaintif.

10. Pada setiap masa material, plaintif-plaintif telah menyatakan kepada defendan-defendan bahawa mereka hanya menurut arahan pegawai atasan mereka iaitu Md Shperi bin Said yang berkuasa untuk memberi kelulusan ke atas pas-pas tersebut. Selain daripada pegawai tersebut, terdapat dua lagi pegawai atasan plaintif-plaintif iaitu Jamilah binti Abd Fahpar dan Asnah binti Abu Seman. Plaintif-plaintif pada setiap masa material berada di bawah arahan dan kawalan ketiga-tiga pegawai atasan tersebut.

11. Lanjutan itu, berkenaan pas-pas tersebut, plaintif-plaintif hanya bertugas untuk mencetak pas-pas tersebut setelah syarat pembayaran telah dilakukan dan kelulusan diberikan oleh pegawai-pegawai atasannya. Tiada wujudnya prosedur untuk menyemak sama ada pengeluaran pas-pas tersebut adalah teratur. Plaintif-plaintif juga tidak pernah diberi kuasa kelulusan ke atas pas-pas tersebut.

12. Walaupun perkara tersebut telah dimaklumkan kepada defendan-defendan, defendan-defendan tidak menghiraukan/mengendahkan faktor-faktor tersebut dan telah meneruskan tatatertib ke atas plaintif-plaintif yang akhirnya menyebabkan mereka dibuang kerja.

13. Tambahan lagi, defendan-defendan juga pada setiap masa material tidak memanggil mana-mana pegawai-pegawai atasan untuk memberi rakaman percakapan berkenaan pertuduhan tersebut maka kegagalan ini memprejudiskan plaintif-plaintif dan keputusan yang dibuat oleh defendan-defendan adalah tidak sah dan melanggar hak asasi plaintif-plaintif.

[21] There was no statement of defence before the court to traverse the plaintiffs' allegations in the statement of claim as the defendants had applied to strike out the plaintiffs' claim upon service of the writ of summons and the statement of claim.

[22] Be that as it may, on the face of it, the plaintiffs' claim could not be said to be obviously unsustainable. In our view, the allegations raised in paras 9, 10, 11, 12 and 13 of the statement of claim are factual matters which merit investigation in a full trial. This sets it apart from *Ahmad Jefri*, where the facts as found in the judgment of James Foong FCJ are quite straight forward as follows. The appellant had a dispute with his superior and refused to turn up for work since 28 March 2001. On 25 January 2003, his solicitors wrote to the respondents enquiring about his employment status. They were informed on 7 February 2003 that the appellant was dismissed from government service since 25 October 2001 vide a *gazette* notification No 11898 dated the same day. About a year later, on 15 January 2004, the appellant filed a writ of summons and statement of claim against the respondents seeking for a declaration that his dismissal by the respondent is void and of no effect and he is still a government officer in the said ministry; an inquiry be conducted into his salary and entitlement which he ought to receive as a government servant;

damages for wrongful dismissal and interest and costs.

[23] On the facts, Ahmad Jefri's case did not warrant investigation by way of a full trial as he was dismissed from service upon his conscious act of being absent from work. The challenge to his dismissal could be appropriately dealt with in an O 53 application. There was not a trace of a private law involvement nor do the circumstances justify his dismissal be dealt with by way of a writ action.

CONCLUSION

[24] Applying the decision of the Federal Court in *Ahmad Jefri* that a challenge on the use of appropriate procedure is very much fact based, we were unanimous in our decision that on the facts and circumstances of the present appeal, the mode used by the plaintiffs via the writ action was entirely appropriate. It cannot therefore amount to an abuse of the process of the court which rendered the plaintiffs' claim liable to be struck out nor could it be said that the claim is scandalous, frivolous or vexatious. The appeal was thus allowed and the case remitted to the High Court for trial.

Appeal allowed; case remitted to High Court for trial.

Reported by Dzulqarnain Ab Fatar